Bechab v. Mesubed, 13 ROP 233 (Tr. Div. 2006)

MARGIE BECHAB,
Plaintiff,

v.

EMORY MESUBED,
Defendant.

CIVIL ACTION NO. 03-392

Supreme Court, Trial Division
Republic of Palau

Decided: January 16, 2006

KATHLEEN M. SALII, Associate Justice:

INTRODUCTION

On November 6, 2003, Markus Bechab (hereinafter "Plaintiff" or "Markus") filed this complaint against Emory Mesubed (hereinafter "Defendant" or "Emory") seeking invalidation of a Deed of Transfer from Mesubed Bechab to Defendant dated August 19, 2003. Upon Plaintiff's death in 2004, his daughter, Margie Bechab, was substituted as Plaintiff and the caption has been amended to reflect the actual parties. Plaintiff asks this Court to order the Land Court to cancel the Certificates of Title that show Emory as a co-owner and to reissue Certificates for the land showing Markus and Mesubed as owners. Both parties submitted motions for summary judgment, which the Court denied. By agreement of the parties, the submissions filed in support of the motions for summary judgment were incorporated into the trial record, and the matter proceeded to trial. The following constitutes the Court's findings of facts and conclusions of law.

BACKGROUND

The Deed of Transfer which is the subject of this case involves four discrete parcels of land in Ngermechau, Ngiwal State. The first three parcels are further described as Tochi Daicho Lot Nos. 806, 807, and 808, identified as Cadastral Lot Nos. 020 D 08, 020 D 07, and 020 D 06, respectively, and referred to as *Imekang*, and the last parcel is described as Tochi Daicho Lot Nos. 824, 825, 826 and 845, identified as Cadastral Lot No. 020 D 01, and hereinafter referred to as *Ngerwet*.

Brothers Markus and Mesubed filed claims of ownership of these four lots in Ngiwal after their father, who owned all the lots, died. On January 13, 1995, the Land Claims Hearing Office ("LCHO") awarded the lots to the brothers as individual owners in fee simple after it rejected their request to own the land in joint tenancy. In support of its decision, the LCHO claimed that joint tenancy was contrary to Palauan custom. There was no appeal of the 1995

⊥234 Determination of Ownership.

In 2001, Mesubed executed a Warranty Deed conveying interests in *Ngerwet* to Surangel Whipps, Jr. In 2003, Mesubed executed a Deed of Transfer, purporting to transfer all of his rights and interests in the lands at issue, including interests he had deeded to Surangel in 2001, to his son Emory, Defendant herein. [1] Based on the 2003 deed from Mesubed to Defendant, the Land Court issued new Certificates of Title, identifying Plaintiff and Defendant as owners of the lots in fee simple. Based on his status as co-owner of the land at issue, Plaintiff challenges the validity of Mesubed's transfer of his interests in the lands to Defendant.

In addition to an affidavit of Tmatk Timulch submitted in support of summary judgment, Plaintiff's relied on Wataru Elbelau's expert testimony at trial. Both Timulch and Elbelau indicated that under custom, when two or more individuals own land, they own the land together without specifying who owns what percentage of the land, and that a co-owner cannot, on his own and without consent of the other co-owners, convey any interest in the land to a third party. Under this version of custom, when one co-owner dies, his interest in the lands remains with the surviving co-owners and does not automatically vest in the deceased co-owner's children.

Defendant's experts (William Tabelual by affidavit in support of summary judgment and Moses Uludong at trial) believe just the opposite. According to these experts, custom recognizes joint ownership of land by individuals, which is different from family-owned land or other forms of land ownership by more than one person. The classification of ownership in common by individuals permits each owner to transfer his rights or interests in the land to another without first obtaining consent of the other co-owners. This is distinguishable from family-owned land, where one family member cannot transfer any rights or interests in the family-owned land without consent of the other family members.

ANALYSIS

The Court begins by looking at the 1995 Determination of Ownership. In its September 28, 2004 decision denying summary judgment, the Court held that it lacked jurisdiction to consider the propriety of the LCHO's determination. Because neither Markus nor Mesubed appealed the LCHO determination, Defendant's earlier argument that Markus and Mesubed intended to own the property in joint tenancy and so the LCHO's rejection of their claim of joint ownership is void is unavailing at this late date; thus, the Certificates of Title showing Markus and Mesubed as the individual owners in fee simple represent the final and enforceable decision of the LCHO.[2]

Nevertheless, the Court looks at this ⊥235 Determination of Ownership to ascertain the

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[1] Defendant has stated in this trial that he will honor the conveyance of portions of *Ngerwet* to Whipps, Jr. Thus, the discussion refers solely to Defendant's interest in the land.

[2] Unappealed determinations of ownership are final and generally valid against the world. *Bilamang v. Oit* , 4 ROP Intrm. 23, 28 (1993). Parties who chose not to appeal in a timely manner are bound by the LCHO determination and are barred from relitigating that determination in a later proceeding. *Idid Clan v. KSPLA* , 9 ROP 12, 14 (2001); *Ngatpang State v. Amboi* , 7 ROP Intrm. 12, 16 (1998).

interest that each owner had in the lands and starts off with general principals of Palauan ownership of land and disposition thereof. It is clear that there are certain forms of land ownership by groups under which no individual has any right to transfer either a whole or part of the property. For example, lineage land cannot be transferred except by agreement of the senior strong members of the lineage. *Ngiradilubch v. Nabeyama*, 3 ROP Intrm. 101, 105 (1992) ("It is also widely known that it is Palauan custom that the consent of the senior strong members of [a] Lineage . . . is necessary to alienate Lineage land."). It has also been established that clan members do not "own" partial interests in clan land. *Obak v. Bandarii*, 7 ROP Intrm. 254, 255 (Tr. Div. 1998). Thus, a clan member cannot transfer clan land on his own, nor can he alone transfer any part of the land during his lifetime or upon his death. *Id.*

This case, however, does not involve clan or lineage land. Bechab individually owned the lands at issue in fee simple. After his death, the LCHO awarded Bechab's lands to his two sons. In this case, the ownership of the lands is by neither a clan nor a lineage, and they are not family-owned lands. Instead, the lands were jointly owned by brothers who each have an unspecified interest in the lands. This raises the central issue of this case: what are an individual co-owner's rights with respect to transferring his interest in land.

While Plaintiff argues that Mesubed's actions in conveying his interest in the lands without consulting with Marcus is contrary to Palauan custom, the Court finds that this case can be resolved by determining the validity of the transfer under applicable statutory provisions. *See* 1 ROP § 301 (stating that customary law shall have the full force and effect of law so long as it is not inconsistent with other legal authority). However, even were the matter to be decided under Palauan custom,[3] the Court finds that Plaintiff has not met his burden of proof of an established custom regarding disposition of jointly-owned land, as will be discussed later in this decision.

Both parties spent time during closing arguments discussing the history of Palau District Code Section 801, the predecessor statute to today's 25 PNC § 301. Nevertheless, the Court believes that the issue of the validity of Mesubed's transfer of his interests in the lands is addressed by 39 PNC § 403, governing fee simple land transfers. This section provides that:

> Land now held in fee simple or hereafter acquired by individuals may be transferred, devised, sold or otherwise disposed of at such time and in such manner as the owner alone may desire, regardless of established local customs which may control the disposition or inheritance of land through matrilineal lineages or clans.

39 PNC § 403. The parties were not totally amiss in discussing PDC § 801, however, because its preamble also included this same language. *See also Wally v. Sukrad*, 6 ROP ⊥236 Intrm. 38, 40 n.5 (1996) (quoting the language from the preamble of § 801).

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[3] Article V, Section 2 of the ROP Constitution provides that statutes and traditional law shall be equally authoritative, but in case of conflict between statutory and traditional law, the statute shall prevail only to the extent that it is not in conflict with the underlying principles of the traditional law. The Court has not located any case which addresses this specific constitutional provision.

In fact, the *Wally* Court held that this language indicated the Legislature's intention to distinguish "between clan or lineage land on the one hand, and individual property on the other." *Id.* at 40. More importantly, however, the Court found that the co-owners of the land at issue each held an undivided one-half interest in the land. *Id.* at 41. It further stated that a co-owner may sell his undivided share of land, but not sell the land or a portion of it without the agreement of all co-owners. *Id.* at 41 n.9.

This Court agrees that the statutory language indicates legislative intention to distinguish clan and lineage land from individually-owned land. In addition, it agrees with the *Wally* Court that a co-owner may sell his undivided interest in the land. Thus, under § 403, Mesubed was free to transfer his interest in the lands at any time during his lifetime or after his death regardless of "established local customs which may control the disposition or inheritance of land through matrilineal lineages or clans." This Mesubed did when he executed the 2003 Deed of Transfer of his interests in the lands to Defendant.

Plaintiff also relies on the testimony and evidence presented at trial of two expert witnesses who claim that it is Palauan custom that a co-owner must receive consent of the other co-owners before transferring any interest in the jointly-owned land. Defendant presented two other expert witnesses, who were equally credible, who claimed that Palauan custom did not require such consent before transferring an interest in jointly-owned land. In order for a customary law to be applicable, a party must establish the custom by clear and convincing evidence. *Ngirutang v. Ngirutang*, 11 ROP 208, 210 (2004). In light of these divergent views on Palauan custom with respect to individually-owned land and disposition thereof, the Court finds that Plaintiff has not met his burden of proof in establishing that under custom, jointly-owned land cannot be transferred by one co-owner without the consent of the other co-owner. The Court reached the same decision in a similar case. *See Obak,* 7 ROP Intrm. at 256.

To illustrate, Plaintiff's expert, Wataru Elbelau, testified that there are three general ways under custom in which property is given to a man's children. First, when a man dies, his individual property would be given to his children at the eldecheduch. Second, when a man receives land as ulsiungel or as a gift for services performed, he can give this land to his children. Third, when a man commits adultery, he simply walks away, leaving the family house and the land for his children. Under all of these circumstances, it is understood that all of the children own the property equally. However, if the man's children, on their own, agree that just certain siblings will own the property, that is acceptable under custom so long as there is discussion and consensus. Absent such discussion and consensus, the property is not to be divided or transferred.

None of these situations is applicable to this case, where Bechab died owning the lands individually but it was never established how he came to own the properties, and these properties were not discussed at the eldecheduch. Subsequently, his two oldest sons, Markus and Mesubed, claimed the lands for themselves but not for Bechab's seven other children. Eventually, they obtained certificates of title showing the two of them alone as owners in fee of Bechab's properties. The Court therefore finds that there is no ⊥237 custom applicable to the disposition of the properties in this case.

Nevertheless, even were custom to apply, on cross-examination, the expert was asked what happens under custom when a sibling does not follow custom and simply transfers his share in land he owns with another sibling without first discussing the matter. The answer was simply that the sibling's act would be considered a disgrace and the public would not look favorably on him, but there was nothing the other sibling could do. Here, Markus certainly was not happy with Mesubed's transfer of his interests in the lands to his son, but neither applicable law nor custom prohibits the transfer.

Based on these facts, Plaintiff has not proven the existence of a custom on disposition of jointly-owned individual land by clear and convincing evidence. However, even were such a custom proven at trial, the consequence of a person's action of non-conformity to the established custom is disgrace to the person who disregards custom, but the transfer cannot be undone. In this case, applying this logic, Mesubed's act may bring shame to his family if it violated custom, but the transfer will simply be allowed to stand.

Because the Court has determined that Defendant is entitled to a dismissal of Plaintiff's claim under 39 PNC § 403, the Court does not address Defendant's alternative argument that even were the Court to declare the 2003 Deed of Transfer invalid, he would still be a co-owner of the land at this time because he would have inherited it when his father passed away earlier this year since he and his siblings would be Mesubed's heirs and none of his siblings challenge his ownership.[4]

CONCLUSION

For the reasons discussed above, and based on the evidence presented, the Court finds that Plaintiff has not met his burden of proof to establish that Mesubed's transfer of his interests in the lands in Ngermechau, Ngiwal to Defendant was void. Accordingly, the Certificates of Title issued to Plaintiff and Defendant are valid and Defendant is entitled to judgment in his favor dismissing the complaint.

A separate judgment will issue in accordance herewith.

[4] As discussed in *Obak*, there is some support for the proposition that the interests of joint owners pass separately upon their respective deaths. *Obak*, 7 ROP Intrm. at 256; *see also Wally*, 6 ROP Intrm. at 40; *Rengulbai v. Solang*, 4 ROP Intrm. 68, 74 (1993).